

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs January 25, 2006

STATE OF TENNESSEE v. SERVANDO DELASANCHIA CASTREJON

Direct Appeal from the Circuit Court for Marshall County
No. 16601 Robert Crigler, Judge

No. M2005-01886-CCA-R3-CD - Filed April 6, 2006

Defendant, Servando Delasancha Castrejon, entered a plea of guilty to two counts of sexual battery by an authority figure, a Class C felony, and two counts of unlawful photographing in violation of privacy, a Class A misdemeanor, without a recommendation from the State as to sentencing. Following a sentencing hearing, the trial court sentenced Defendant as a Range I, standard offender, to four years, six months for each felony conviction, and eleven months, twenty-nine days for each misdemeanor conviction. The felony sentences are to be served consecutively to each other, with the misdemeanor sentences concurrently with each other and with one of the felony sentences, for an effective sentence of nine years. Defendant does not challenge the trial court's denial of alternative sentencing or the length of his sentences. In his appeal, Defendant argues that the trial court erred in imposing consecutive sentencing. After a careful review of the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Trial Court Affirmed

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

Donna Leigh Hargrove, District Public Defender; and Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Servando Delasancha Castrejon.

Paul G. Summers, Attorney General and Reporter; C. Daniel Lins, Assistant Attorney General; William Michael McCown, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, the State of Tennessee.

OPINION

The facts and circumstances surrounding Defendant's offenses are derived from the State's offer of proof at the guilty plea submission hearing. The victim was fourteen years old at the time of the offenses. Her mother, Defendant's girlfriend, left the victim in the care of Defendant while the mother worked. On two separate occasions, Defendant videotaped himself touching the victim while she slept. On the first occasion, the videotape showed Defendant touching the victim's breast.

On the second occasion, Defendant placed his hand underneath the victim's clothing covering her vaginal area. The victim's mother later discovered the videotape. The victim slept through the offenses and has no independent recollection of Defendant's unlawful conduct.

The offense of sexual battery by an authority figure is defined, as relevant here, as unlawful sexual contact with a victim by the defendant, where the victim is between thirteen years old and eighteen years old, and the defendant had, at the time of the offense, parental or custodial authority over the victim, and used such authority to accomplish the sexual contact. Tenn. Code Ann. § 39-13-527(a)(1)(B). "Sexual contact" includes the intentional touching of the victim's . . . intimate parts, or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can be reasonably construed as being for the purpose of sexual arousal or gratification." *Id.* § 39-13-501(6). The offense of unlawful photographing in violation of privacy, as relevant here, requires proof that Defendant knowingly photographed an individual while the individual was in a place where there is a reasonable expectation of privacy, without, in the case of a minor victim, the prior effective consent of the minor's parent or guardian, if the photograph was taken for the purpose of Defendant's sexual arousal or gratification. *Id.* § 39-13-605(a)(2).

At the sentencing hearing, Beth Ladner, an employee with the Tennessee Board of Probation and Parole, testified that she prepared Defendant's presentence report. According to the report, between 2000 and 2004, Defendant accumulated numerous misdemeanor convictions, including one conviction for driving under the influence, two public intoxication convictions, and five domestic assault convictions. Ms. Ladner said that as a result of his convictions, Defendant had been placed on probation at least five times.

On December 3, 2001, Defendant was convicted of domestic assault, and sentenced to eleven months, twenty-nine days, all suspended but seven days, and Defendant was placed on probation for six months. Defendant committed domestic assault on February 17, 2002 and was convicted of that offense on April 22, 2002. Defendant was again placed on probation for eleven months, twenty-nine days. While on probation for this offense, Defendant committed domestic assault on May 29, 2002, public intoxication on June 16, 2002, and domestic assault on December 14, 2002.

Ms. Ladner stated that Defendant failed to disclose the driving under the influence conviction in Maury County during her interview with him. Defendant has two Tennessee driver's licenses on record with the Tennessee Department of Safety. Driver's license no. 090679368 was issued in the name of Servando Castrejon de la Sancha and lists a birth date of February 23, 1979. Defendant was in possession of this driver's license when he was arrested on the current charges and when he was arrested for DUI in Maury County. The driver's license was in a revoked status at the time of the sentencing hearing.

The second driver's license is issued in the name of Servando D. Castrejon and lists a birth date of February 23, 1975. Defendant was in possession of this driver's license when he was

convicted of the remaining prior offenses. This driver's license was suspended at the time of the sentencing hearing.

Ms. Ladner said that Defendant was a native of Mexico and had been working in Lewisburg since January 1998. The presentence report lists Defendant's birth date as February 23, 1979, and Defendant was twenty-six years old at the time of the sentencing hearing. Defendant stated in his presentence report that he consumed approximately twelve beers each day, and used about two grams of cocaine every other day. Defendant also acknowledged that he used crack cocaine "occasionally" and had tried marijuana "once." Defendant attended Alcoholics Anonymous meetings for two weeks in 2002, and had previously attended court-ordered anger management classes as a result of his domestic assault convictions.

On cross-examination, Ms. Ladner acknowledged that Defendant expressed remorse for the offenses.

Detective Kevin Patin with the Lewisburg Police Department, introduced the videotape of the victim as an exhibit. Detective Patin testified that he verified that Defendant is in the United States illegally.

We note initially that on June 7, 2005, the General Assembly amended Tennessee Code Annotated sections 40-35-102, -114, -210, -303, and -401 regarding enhancing sentencing factors. *See* 2005 Tenn. Pub. Acts ch. 353, §§ 1, 5, 6, 7, 8. However, the amended code sections are inapplicable to Defendant's appeal because his offenses occurred prior to June 5, 2005, the effective date of the act, and, although his sentencing hearing was conducted after the effective date of the act, Defendant did not elect to be sentenced under the provisions of the act by executing a waiver of his ex post facto protections. *See* 2005 Tenn. Pub. Acts ch. 353 §§ 18, 22.

The trial court denied Defendant's request for probation based on his extensive criminal history, his prior unsuccessful completion of sentences less restrictive than confinement, the need to avoid depreciating the seriousness of the offense, and in order to provide an effective deterrent to others. *See* Tenn. Code Ann. §§ 40-35-102(3)(B); 40-35-103(1)(A)- (C).

In determining the length of Defendant's sentence, the trial court placed great weight on Defendant's extensive criminal history and his previous unwillingness to abide by the terms of his various probated sentences as enhancement factors. *See id.* § 40-35-114(2) and (9). The trial court sentenced Defendant as a Range I, standard offender, to four years, six months for each of his Class C felony convictions, and eleven months, twenty-nine days for each misdemeanor conviction.

Because Defendant was convicted of two statutory offenses involving the sexual abuse of a minor, the trial court gave some consideration to the nature and circumstances of the offenses, and Defendant's relationship with the victim, in determining the manner of service of Defendant's sentences. *See id.* § 40-35-115(b)(5). The trial court found, however, that the extensiveness of

Defendant's criminal history alone was sufficient to support the imposition of consecutive sentencing. *See id.* § 40-35-115(b)(2).

In his appeal, Defendant does not challenge the length of his sentences or the trial court's denial of alternative sentencing. Defendant contends, however, that his criminal history by itself was not sufficient to support the trial court's order of consecutive sentencing. Defendant argues that there was no basis for finding that Defendant was a dangerous offender, and the trial court erred in considering the nature and circumstances of the offenses in determining that consecutive sentences were appropriate. Defendant contends that there was no evidence that the victim was harmed by Defendant's sexual conduct, and the sexual conduct was not aggravated.

When a defendant challenges the length or the manner of service of his or her sentence, this Court must conduct a *de novo* review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d); *State v. Imfeld*, 70 S.W.3d 698, 704 (Tenn. 2002). This presumption, however, is contingent upon an affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). If the record fails to show such consideration, the review of the sentence is purely *de novo*. *State v. Shelton*, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992).

In making its sentencing determinations the trial court must consider: (1) the evidence presented at the sentencing hearing; (2) the pre-sentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct; (5) any appropriate enhancement and mitigating factors; (6) the defendant's potential or lack of potential for rehabilitation or treatment; and (7) any statements made by Defendant in his own behalf. Tenn. Code Ann. §§ 40-35-103 and -210; *State v. Williams*, 920 S.W.2d 247, 258 (Tenn. Crim. App. 1995). If the trial court has imposed a lawful sentence by following the statutory sentencing procedure, given due consideration and proper weight to the factors and sentencing principles, and made findings of fact adequately supported by the record, this Court may not modify the sentence even if it would have preferred a different result. *State v. Fletcher*, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). The defendant bears the burden of showing that his sentence is improper. Tenn. Code Ann. § 40-35-401(d) Sentencing Commission Comments; *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991).

When a Defendant is convicted of multiple crimes, the trial court, in its discretion, may order the sentences to run consecutively if it finds by a preponderance of the evidence that a defendant falls into one of seven categories. Tenn. Code Ann. § 40-35-115. The imposition of consecutive sentences is also guided by the general sentencing principles that the length of a sentence be 'justly deserved in relation to the seriousness of the offense' and 'no greater than that deserved for the offense committed.'" *Imfeld*, 70 S.W.3d at 708 (quoting Tenn. Code Ann. §§ 40-35-102(1) and -103(2)); *State v. Lane*, 3 S.W.3d 456, 461 (Tenn. 1999).

In support of the imposition of consecutive sentencing, the trial court stated:

I am also going to find that [Tennessee Code Annotated section 40-35-115(b)(5)] applies. Although [defense counsel] does make an argument that some of those factors to be considered in that give that [factor] lesser weight. But I do find that 5 applies. I am finding that [Tennessee Code Annotated section 40-35-115(b)(2)] of the criminal activity being extensive in and of itself sufficient to justify consecutive sentencing.

We first observe that there is no indication in the record that the trial court considered Defendant's status as a dangerous offender in its sentencing determinations. It is necessary, however, to find the presence of only one of the statutory categories listed in Tennessee Code Annotated section 40-35-115(b) to support the imposition of consecutive sentences. *See State v. Adams*, 973 S.W.2d 224, 231 (Tenn. Crim. App. 1997). The trial court relied primarily on Defendant's record of criminal activity to support its imposition of consecutive sentencing. Defendant is an illegal resident of this country. Since his arrival in 1998, Defendant has accumulated at least ten misdemeanor convictions. Other than relatively brief periods of confinement, Defendant has been extended probated sentences for these convictions with little success in stemming his criminal activity. Despite his illegal residency status, Defendant has two driver's licenses which were issued in different names in violation of Tennessee Code Annotated sections 55-50-301(3) and 55-50-303(a)(9). Defendant acknowledged that he had frequently used cocaine since he was seventeen years old, and he began consuming alcohol when he was fifteen years old.

Various panels of this Court have previously observed that "an extensive record of criminal activity may include criminal behavior which does not result in a conviction." *State v. William L. Vaughn*, No. M2002-01879-CCA-R3-CD, 2003 WL 21877929, *5 (Tenn. Crim. App., at Nashville, Aug. 1, 2003), *perm. app. denied* (Tenn. Dec. 22, 2003) (citing *State v. William Rhea Jackson*, No. M2002-00762-CCA-R3-CD, 2003 WL 1868654, *4 (Tenn. Crim. App., at Nashville, Mar. 27, 2003), *perm. app. denied* (Tenn. Aug. 12, 2003)). Thus, it was appropriate for the trial court to consider Defendant's admitted use of illegal drugs spanning over a number of years. *See State v. Percy Wade Cockrill*, No. M2002-00761-CCA-R3-CD, 2003 WL 1787287, *4 (Tenn. Crim. App., at Nashville, Apr. 4, 2003), *perm. app. denied* (Tenn. August 12, 2003) (In addition to his prior convictions, the defendant's admitted years of marijuana use and to the frequent use of cocaine during the months preceding his arrest supported the trial court's imposition of consecutive sentences on the basis of the defendant's extensive record of criminal activity.) It was also appropriate for the trial court to consider Defendant's illegal residency status, and his disregard for the motor vehicle licensing requirements of this state.

Based on our review, we conclude that the record supports the trial court's finding that Defendant has an extensive history of criminal activity, and that the length of the effective sentence imposed is "justly deserved in relation to the seriousness of the offense" and "no greater than that deserved for the offense committed." *See* Tenn. Code Ann. §§ 40-35-102(1), 40-35-103(2). Defendant is not entitled to relief on this issue.

CONCLUSION

After review, we affirm the judgments of the trial court.

THOMAS T. WOODALL, JUDGE